

NO. 41495-3-II

COURT OF APPEALS
DIVISION II

FILED 11-01-09 PM 3:00

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

BY 
Clerk

STATE OF WASHINGTON, RESPONDENT

v.

DERRICK DEMONE JOHNSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 08-1-04548-1

Response Brief

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Whether after viewing the evidence in the light most favorable to the prosecution, the jury could have found the defendant guilty beyond a reasonable doubt of unlawful possession of a firearm?..... 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT..... 4

 1. THE JURY PROPERLY FOUND DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A FIREARM BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT HE HAD DOMINION AND CONTROL OVER THE PREMISES WHERE IT WAS LOCATED, KNOWLEDGE OF ITS PRESENCE, AND WAS WITHIN CLOSE PROXIMITY WHEN IT WAS USED TO SHOOT THE VICTIM 4

D. CONCLUSION..... 11-12

Table of Authorities

State Cases

| | |
|--|-------|
| <i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989)..... | 4 |
| <i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)..... | 4, 10 |
| <i>State v. Callahan</i> , 77 Wn.2d 27, 31, 459 P.2d 400 (1969) | 6 |
| <i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) | 5, 11 |
| <i>State v. Cantabrana</i> , 83 Wn. App. 204, 208, 921 P.2d 572 (1996) | 7, 8 |
| <i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987) | 5 |
| <i>State v. Chavez</i> , 138 Wn. App. 29, 34, 156 P.3d 246 (2007)..... | 6 |
| <i>State v. Coahran</i> , 27 Wn. App. 664, 668, 620 P.2d 116 (1980) | 6 |
| <i>State v. Collins</i> , 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995)..... | 8 |
| <i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)..... | 5 |
| <i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)..... | 5 |
| <i>State v. Echeverria</i> , 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)..... | 7 |
| <i>State v. Edwards</i> , 9 Wn. App. 688, 690, 541 P.2d 192 (1973) | 8 |
| <i>State v. Hagen</i> , 55 Wn. App. 494, 499, 781 P.2d 892 (1989)..... | 6, 8 |
| <i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965) | 4 |
| <i>State v. Jones</i> , 146 Wn.2d 328, 333, 45 P.3d 1062 (2002) | 6, 8 |
| <i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993) | 4 |
| <i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988)..... | 4 |

| | |
|---|-------------|
| <i>State v. Mathews</i> , 4 Wn. App. 653, 656, 484 P.2d 942 (1971)..... | 7 |
| <i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)..... | 4 |
| <i>State v. Partin</i> , 88 Wn.2d 899, 906, 567 P.2d 1136 (1977) | 6 |
| <i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)..... | 5 |
| <i>State v. Shumaker</i> , 142 Wn. App. 330, 334, 174 P.3d 1214 (2007)..... | 7, 8 |
| <i>State v. Summers</i> , 45 Wn. App. 761, 763-64, 728 P.2d 613 (1986)..... | 8 |
| <i>State v. Turner</i> , 103 Wn. App. 515, 520–21, 13 P.3d 234 (2000)..... | 7, 8, 9, 10 |
| <i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)..... | 4 |
| <i>State v. Weiss</i> , 73 Wn.2d 372, 375 438 P.2d 610 (1968) | 6, 9 |
| <i>State v. Wilson</i> , 20 Wn. App. 592, 596, 581 P.2d 592 (1978) | 8, 9 |
| Statutes | |
| RCW 9.41.040 | 5 |
| RCW 9.41.040(1)(a) | 6 |

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether after viewing the evidence in the light most favorable to the prosecution, the jury could have found the defendant guilty beyond a reasonable doubt of unlawful possession of a firearm?

B. STATEMENT OF THE CASE.

1. Procedure

On September 30, 2008, the Pierce County Prosecuting Attorney's Office (State) charged Derrick Demone Johnson, defendant, with assault in the first degree including a firearm enhancement, drive-by shooting, and unlawful possession of a firearm in the first degree. CP 1-2. The State later amended the assault charge to attempted murder in the first degree. CP 11. Defendant pleaded not guilty to all counts. 8/5/2010 RP 21-22.¹ The Honorable Katherine M. Stolz empanelled a jury on August 9, 2010. 1RP 38. Before hearing testimony, the court accepted defendant's stipulation to having been convicted of a prior felony and was not

¹ The proceedings on August 5, 2010, were transcribed as reporter's proceedings but not issued a volume number. Accordingly, the State will refer to these proceedings as "8/5/2010 RP" in its brief.

permitted by law to possess a firearm during the time of the shooting. 1RP 16, 48–49.

On August 26, 2010, the jury found defendant guilty on all counts, including the crime of unlawful possession of a firearm in the first degree. 7RP 922. The court sentenced defendant to a total of 471 months.

10/22/2010 RP 13.²

The appeal was not filed until November 24, 2010, and was therefore not timely. *See* CP 68. Although the Court of Appeals placed the matter on its motion calendar for dismissal, defendant made a motion to extend time to file on December 10, 2010. The Court of Appeals granted defendant’s motion on December 20, 2010, without giving the State an opportunity to respond.

2. Facts

On the evening of September 4, 2008, defendant, also known as “Top Dog,” was driving a black Dodge Intrepid in Tacoma. 2RP 116–17, 121, 216–17; 3RP 328–29, 408. The vehicle held three other occupants: Demarco McGown, Monteece Brewer, and Brennan Morford. 2RP 119; 3RP 325. McGown’s mother was the owner of Dodge Intrepid. 3RP 324–25; 5RP 571.

² The sentencing proceeding was transcribed as reporter’s proceedings but not issued a volume number. Accordingly, the State will refer to these proceedings as “10/22/2010 RP” in its brief.

Billy-Ray Griffin, the victim, was standing outside of El Hutchos—a local bar—when defendant approached him in the vehicle. 2RP 116–17, 140, 216–17, 202; 5RP 571, 575. Mr. Griffin testified that defendant had previously threatened to shoot and rape him. 2RP 173–76. He and defendant exchanged words through the passenger side window of the Dodge Intrepid, a conversation from which he was able to identify the defendant as the driver. 2RP 123.

Defendant then told his passenger to “smoke” the victim. 2RP 123. Defendant’s passenger proceeded to shoot Mr. Griffin three times, twice in the chest and once in the lower abdomen. 2RP 115, 123, 125; 3RP 412. The victim testified he saw a handgun right before the shooting occurred. 2RP 123–124. Defendant sped away in the vehicle immediately after the shooting. 2RP 126, 237; 3RP 285; 5RP 546–47.

Mr. Griffin spent nearly three months in the hospital. 2RP 130. He sustained severe injuries to both of his lungs and his colon. 2RP 130. While recovering in the hospital, he was able to identify defendant as the driver from a photographic lineup. 2RP 133–34, 219–20. He also identified McGown as the passenger who shot him. 3RP 412–13. Authorities captured and arrested defendant nearly a year later in Texas and extradited him for trial. 4RP 430.

C. ARGUMENT.

1. THE JURY PROPERLY FOUND DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A FIREARM BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT HE HAD DOMINION AND CONTROL OVER THE PREMISES WHERE IT WAS LOCATED, KNOWLEDGE OF ITS PRESENCE, AND WAS WITHIN CLOSE PROXIMITY WHEN IT WAS USED TO SHOOT THE VICTIM.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said, “[G]reat deference [. . .] is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

RCW 9.41.040, unlawful possession of firearms, states:

“A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in

this state or elsewhere of any serious offense as defined in this chapter.”

RCW 9.41.040(1)(a). Either actual or constructive possession is sufficient to convict a defendant of unlawful possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item if he has dominion and control over it. *Jones*, 146 Wn.2d at 333; *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)).

Dominion and control can be established by circumstantial evidence. *State v. Chavez*, 138 Wn. App. 29, 34, 156 P.3d 246 (2007) (citing *State v. Weiss*, 73 Wn.2d 372, 375 438 P.2d 610 (1968)). In a review of whether there is sufficient evidence of dominion and control, the court looks at “the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the [prohibited items] and was thus in constructive possession of them.” *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

Thus, the court looks to the various indicia of dominion and control with an eye to the cumulative effect of a number of factors. *Partin*, 88 Wn.2d at 906; *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). One important factor the court has recognized is having actual dominion and control over the premises where the prohibited item is

found. See, e.g., *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (affirming dominion and control over the premises as a factor); *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007) (holding that dominion and control is one factor from which constructive possession may be inferred).

The court considers an automobile a “premises” for this inquiry. *State v. Turner*, 103 Wn. App. 515, 520–21, 13 P.3d 234 (2000) (citing *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). For example, in *Turner*, the court held that a defendant’s actual control over the premises would create an inference of dominion and control over the prohibited item. *Turner*, 103 Wn. App. at 523. It stated:

When the sufficiency of evidence is challenged on the basis that the State has shown dominion and control only over the premises, and not over [the prohibited item], *courts correctly say that the evidence is sufficient* because dominion and control over premises raises a rebuttable inference of dominion and control over the [prohibited item].

Id. (quoting *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996)) (emphasis added). A jury determines the weight of the inference created between defendant’s actual control over the premises and his dominion and control over the prohibited item. *Turner*, 103 Wn. App. at 524 (citing *Cantabrana*, 83 Wn. App. at 209).

Aside from actual control over the premises, another important factor the court considers is whether the defendant had knowledge of the prohibited item's presence. *Turner*, 103 Wn. App. at 524. "Thus, where there is control of a vehicle and knowledge of a firearm inside it, there is a reasonable basis for knowing constructive possession, and there is sufficient evidence to go the jury." *Id.*

The courts have recognized other factors including close proximity, the ability to exclude others, and having immediate access to the prohibited item. *State v. Edwards*, 9 Wn. App. 688, 690, 541 P.2d 192 (1973) (considering proximity as one factor and exclusion of others as another factor); *State v. Wilson*, 20 Wn. App. 592, 596, 581 P.2d 592 (1978) (recognizing ability to exclude others as a factor); *Jones*, 146 Wn.2d at 333 (holding immediate access to the prohibited item a factor).

No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). Most of these factors alone will generally not be sufficient to establish dominion and control. *Cantabrana*, 83 Wn. App. 204 (dominion and control over the premises alone not sufficient); *Shumaker*, 142 Wn. App. at 334 (accord); *State v. Summers*, 45 Wn. App. 761, 763-64, 728 P.2d 613 (1986) (proximity alone is not sufficient to establish dominion and control); *Hagen*, 55 Wn.

App. at 499 (the ability to reduce an object to actual possession alone is not sufficient). Finally, while the ability to exclude others is a factor, dominion and control need not be exclusive to establish constructive possession. *Wilson*, 20 Wn. App. at 596; *State v. Weiss*, 73 Wn.2d 372, 378, 438 P.2d 610, 613 (1968).

In *Turner*, the court considered these factors in totality when it upheld the defendant's conviction. 103 Wn. App. at 524. There, the defendant was driving a truck where a firearm was located in the back seat and he knew of its presence, even though he did not own the weapon. 103 Wn. App. at 521–22. Notwithstanding the location of the firearm in the backseat, the court stated that the defendant was in close proximity to the weapon. *Id.*

In Johnson's case, the evidence was sufficient for the jury to find that defendant had constructive possession of the firearm. Several factors indicate that defendant had dominion and control, thus constructive possession, over the firearm. First, defendant had dominion and control over the vehicle (i.e., the premises) where the weapon was located. Two witnesses, the victim and Morford, positively identified defendant as the driver whose passenger shot the victim three times. 2RP 116–17, 123, 216–17; 5RP 571, 575. Because he was driving the vehicle at the time of the shooting, defendant had actual control over the vehicle and the weapon. His actual control over the premises created a rebuttable

inference for the jury that he had dominion and control over the firearm as well. *Turner*, 103 Wn. App. at 524. This supported the jury's finding of guilt.

Second, defendant manifested knowledge of the weapon's existence when he ordered his passenger to "smoke" the victim. 2RP 123.

Third, defendant's passenger shot the victim three times immediately after his command. 2RP 123. This particular fact demonstrates that defendant not only had knowledge of the weapon's existence, but also exercised control over the weapon and even the shooter. The jury could have reasonably inferred that defendant had dominion and control of the firearm defendant's actions. *State v. Barrington*, 52 Wn. App. at 484.

It is also worth noting that defendant was in close proximity to the weapon when it was fired from the passenger seat. 2RP 123, 216–18.

When the facts are viewed most favorably to the State, the jury could even reasonably infer that the gun was within defendant's reach. Defendant's actual control of the vehicle, knowledge of its existence, and close proximity creates a strong inference that defendant had constructive possession of the firearm. Accordingly, there was sufficient evidence in this case for the jury to find defendant guilty of unlawful possession of a firearm.

Defendant argues that his statement to smoke the victim is "At best, . . . evidence of [his] influence over the shooter and makes him an

accomplice to the shooting, but it does not place the gun in his possession, constructive or otherwise.” Brief for Appellant at 6. However, this argument overlooks the inference of constructive possession created by defendant’s dominion and control over the vehicle. Moreover, defendant had knowledge of the handgun’s existence and was within reaching distance of the weapon when it was used. When reviewing the situation in its entirety, the jury could properly find defendant was guilty of unlawful possession of a firearm. 7RP 922.

Finally, defendant highlights other witness’s testimony throughout the trial that might infer defendant was not driving the vehicle. Brief of Appellant at 3–4. However, credibility determinations are for the trier of fact and cannot be reviewed on appeal. *Camarillo*, 115 Wn.2d at 71. After hearing all of the testimony, the jury could determine defendant was in the vehicle during the shooting and convicted him of attempted murder and drive-by shooting. 7RP 922. The evidence was sufficient to further find defendant guilty of unlawful possession.

D. CONCLUSION.

There was sufficient evidence for the jury to determine defendant had constructive possession of the handgun used to shoot Mr. Griffin. Defendant had constructive possession of the weapon because he had actual control over the vehicle where it was located and exercised dominion and control over the firearm when he told his passenger to shoot

the victim. Furthermore, he had knowledge of its existence and was within close proximity when it was used to attack the victim. This Court should uphold the defendant's conviction of unlawful possession of a firearm.

DATED: August 8, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Stephen Trinen by K. Hudson
STEPHEN TRINEN *14811*
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.8.11 *[Signature]*
Date Signature

RECEIVED
JUL 11 2011
CLERK OF SUPERIOR COURT
TACOMA, WASHINGTON